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MUNUSWAMY SUNDAR RAJ v. PP

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
JEFFREY TAN FCJ
B ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
[CRIMINAL APPEAL NO: 05-105-05-2013(B)]
6 AUGUST 2014

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Drugs found in bag carried by accused – Whether accused had knowledge of drugs – Whether ingredients of trafficking proved – Whether conviction and sentence safe*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Dangerous Drugs Act 1952, s. 39B(1)(a) – Drugs found in bag carried by accused – Whether accused had knowledge of drugs – Whether ingredients of trafficking proved – Defence of innocent carrier – Whether substantiated – Whether Dangerous Drugs Act 1952 caters for defence of innocent carrier – Whether defence known to law*

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The appellant was arrested at the Kuala Lumpur International Airport ('KLIA') for carrying a bag containing two boxes which were later found to contain 20,077.10g of ketamine. He was charged at the High Court for the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). At the end of the prosecution's case, the charge was reduced F to possession and the appellant pleaded guilty and was sentenced to five years imprisonment and fine. The prosecution appealed to the Court of Appeal ('the first COA') and the first COA ordered the defence to be called on the original charge of trafficking. The appellant's defence was that his journey began at Chennai and he came to Malaysia to meet his relatives and buy G electrical goods. While in transit at the New Delhi Airport, one Faruk gave the bag to the appellant with the instruction that it be handed over to a person at his final destination, KLIA. The appellant submitted that he was an innocent carrier but the defence was rejected by the High Court and the appellant was convicted and sentenced to death for trafficking, as per the H original charge. The decision was affirmed by the Court of Appeal which opined that the DDA does not cater for defence of innocent carrier as the defence is not known to law. Dissatisfied with the decision of the Court of Appeal, the appellant filed the present appeal.

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Held (dismissing appeal; affirming conviction and sentence)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Every opportunity was made available to the appellant to inspect the bag. The appellant was in a position to examine the contents of the bag entrusted by Faruk before it was checked in but he failed to do so. He was clearly guilty of wilful blindness. The appellant's wilful conduct, compounded by his factual impecuniosity, made no sense to his defence, hence leading to the inference that he knew the contents of the bag that he carried. (paras 10 & 12)

(2) The defence of innocent carrier is a valid defence that could be alluded to by an accused person, in this case the appellant. It is imperative that the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance *simpliciter* is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. Without any reason for suspicion, or there was no right or opportunity of examination, ignorance may be a good defence. (paras 8 & 9)

(3) The ingredient of trafficking was established when the appellant carried the drugs from New Delhi Airport to the KLIA. The High Court Judge had not misdirected himself on the law. He had adequately considered the evidence for both the prosecution and the defence carefully in the course of his maximum evaluation and had meticulously supplied his reasons as to why the prosecution's evidence was accepted over the defence and why the solitary defence of innocent carrier was rejected. The conviction and sentence imposed by the High Court and affirmed by the Court of Appeal was safe. There was no reason to rectify the erroneous view held by the Court of Appeal on the proposition of law regarding the defence of innocent carrier. Despite the unintended error of the Court of Appeal, the eventual decision was correct. (paras 14 & 15)

Bahasa Malaysia *Headnotes*

Perayu ditahan di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') kerana membawa beg berisi dua kotak yang kemudiannya didapati mengandungi 20,077.10g ketamin. Dia dipertuduh di Mahkamah Tinggi bagi kesalahan mengedar dadah, di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di akhir kes pendakwaan, pertuduhan dikurangkan kepada milikan dan perayu mengaku bersalah dan dijatuhkan hukuman lima tahun penjara dan denda. Pihak pendakwaan merayu ke Mahkamah Rayuan ('MR pertama') dan MR pertama memerintahkan pembelaan dipanggil bagi pertuduhan asal pengedaran. Pembelaan perayu adalah dia memulakan perjalanan dari Chennai dan dia datang ke Malaysia untuk bertemu saudaranya dan membeli perkakas elektrik. Semasa sedang transit di

Lapangan Terbang New Delhi, seorang yang bernama Faruk memberi beg kepada perayu dengan arahan bahawa beg tersebut perlu diserahkan kepada seseorang di destinasi terakhirnya iaitu KLIA. Perayu menghujahkan bahawa dia pembawa tidak bersalah tetapi pembelaan ini ditolak oleh Mahkamah Tinggi dan perayu disabitkan dan dijatuhkan hukuman mati atas kesalahan mengedar dadah, seperti pertuduhan asal. Keputusan ini disahkan oleh Mahkamah Rayuan yang berpendapat bahawa ADB tidak memperuntukkan pembelaan bagi pembawa tidak bersalah kerana pembelaan ini tidak diperakui di bawah undang-undang. Tidak berpuas hati dengan keputusan Mahkamah Rayuan, perayu memfailkan rayuan ini.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Banyak peluang timbul yang membolehkan perayu memeriksa beg tersebut. Perayu boleh memeriksa kandungan beg yang diamanahkan oleh Faruk sebelum beg itu didaftar masuk tetapi dia gagal berbuat demikian. Jelas bahawa perayu bersalah atas kebutaan sengaja. Tindakan sengaja perayu ditambah dengan kekurangan fakta, menjadikan pembelaannya tidak masuk akal, hingga membawa kepada kesimpulan bahawa dia tahu kandungan beg yang dibawanya.

(2) Pembelaan pembawa tidak bersalah adalah pembelaan sah yang boleh diguna pakai seorang tertuduh, dalam kes ini perayu. Satu kemestian bahawa pembelaan pembawa tidak bersalah amat bergantung pada fakta dalam setiap kes, dan ia adalah hal perkara yang terjumlah dalam bidang kuasa hakim bicara. Kejahilan *simpliciter* tidak cukup untuk melepaskan seseorang tertuduh kerana semua tertuduh akan mengguna pakai pembelaan yang sama. Tanpa sebab yang membangkitkan syak, atau ketiadaan hak atau peluang untuk memeriksa, kejahilan boleh menjadi pembelaan yang baik.

(3) Intipati pengedaran terbukti apabila perayu membawa dadah dari Lapangan Terbang New Delhi ke KLIA. Hakim Mahkamah Tinggi tidak tersalah arah diri beliau mengenai undang-undang. Beliau telah mempertimbangkan secukupnya keterangan pihak pembelaan dan pendakwaan dengan teliti dalam menjalankan penilaian penuh dan telah dengan cermat memberikan alasan tentang kenapa keterangan pihak pendakwaan mengatasi pihak pembelaan dan kenapa pembelaan pembawa tidak bersalah yang terasing telah ditolak. Sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi dan disahkan oleh Mahkamah Rayuan selamat. Tiada sebab untuk meminda pandangan Mahkamah Rayuan atas kekhilafannya mengenai pembelaan pembawa tidak bersalah. Tanpa mengira kekhilafan Mahkamah Rayuan yang tidak disengajakan, keputusan akhirnya adalah tepat.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(refd)***
Marlan Marpaung v. PP [2012] 8 CLJ 41 CA ***(refd)***
PP v. Amil Akmad [2007] 4 CLJ 688 CA ***(refd)***
Venkatesan Chinnasami v. PP [2011] 1 LNS 1736 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)

For the appellant - Baljit Singh Sidhu (Mahendren Naidu with him); M/s Shukor Baljit & Partners
For the respondent - Muhamad Iskandar Ahmad; DPP

[Editor's note: For the Court of Appeal judgment, please see Munuswamy Sundar Raj v. PP [2013] 1 LNS 183 (affirmed)]

Reported by Najib Tamby

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The appellant was arrested at the Unit Khas Pemeriksaan Penumpang (UKPP) of the Kuala Lumpur International Airport (KLIA) for carrying a bag containing two boxes, later found to contain ketamine. He was later charged with trafficking in 20,077.1g of ketamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

[2] At the end of the prosecution's case, the High Court reduced the charge to possession whereupon the appellant pleaded guilty and sentenced to five years imprisonment and fine. Being dissatisfied the prosecution appealed to the Court of Appeal. The appeal was successful and the Court of Appeal (first Court of Appeal) ordered the defence to be called on the original charge of trafficking.

[3] At the defence stage at the High Court, the appellant's defence was as follows. He came to Malaysia to meet his relatives and to buy electrical goods. His journey began at Chennai. From there he took a train to Bombay. He then flew down and transited at New Delhi airport. At the New Delhi airport, before flying off to KLIA that impugned bag was given to him by a person called Faruk, with the follow-up instruction that it be handed over to a person at KLIA. For that alleged simple service he was promised RM2,000. He eventually arrived at his final destination ie, KLIA whereat he was arrested.

[4] The learned trial judge however rejected the appellant's defence that he was an innocent carrier, which would have entitled him to an acquittal. As the appellant did not adduce fresh evidence despite the first Court of Appeal having found *mens rea* possession, the appellant thus had failed to cast

a reasonable doubt on the prosecution's case by depending solely on that defence of innocent carrier. The learned judge in the course of sifting through the total evidence, *inter alia*, stated that it was not reasonable to have been paid RM2,000 for that alleged service, let alone he had insufficient money to buy the electrical goods here. The appellant thereupon was convicted and sentenced to death for trafficking as per the original charge.

[5] On appeal filed at the Court of Appeal, the decision of the learned judge was affirmed. In the course of dismissing the appeal, the Court of Appeal held that the Act did not cater for the defence of 'innocent carrier'. More of this erroneous view later. Being dissatisfied with the decision the appellant appealed to us.

[6] It must be reminded that the High Court in this case had heard the defence premised on the instruction of the first Court of Appeal to have the case heard based on the original charge. In ordinary parlance, the first Court of Appeal was satisfied that the prosecution had successfully proven the element of custody, control, knowledge and the ingredient of trafficking in favour of the prosecution. It was common ground that the first Court of Appeal had never alluded to any presumptive provision when concluding that a *prima facie* case of trafficking as per the charge had been established. With such an order meted down to hear the defence there was absolutely no necessity for the learned judge to reopen the matter and decide again whether a *prima facie* case had indeed been established. All that was needed for the learned judge to acquiesce to the order of the superior court and to test that *prima facie* case against any evidence adduced by the appellant at the end of the trial. In other words, the learned judge must undertake a maximum evaluation of the evidence (*Balachandran v. PP* [2005] 1 CLJ 85). This the learned judge did. He analysed the total evidence adduced in the course of the trial in order to ascertain the substantive defence of innocent carrier. As said above, with no fresh evidence to substantiate his defence of being an innocent carrier the appellant was eventually found guilty, convicted and sentenced to death for trafficking as per the charge.

Issue Of Innocent Carrier

[7] On the issue of innocent carrier, the Court of Appeal in its grounds of judgment at p. 2 (para. 3) had authored the following:

> We must at the outset say the Dangerous Drugs Act 1952 does not cater for defence of 'innocent carrier', *per se* i.e. innocent carrier is not a defence known to law.

At p. 13 (para. 16) again the Court of Appeal stated:

> As we have stated earlier there is no defence known to law as asserted by the learned counsel for the appellant ie, the defence of innocent carrier.

[8] We were rather perturbed by the above remarks as that is not the correct proposition of law in drug trafficking cases. The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant. A plethora of cases sprinkles the legal journals in Malaysia and suffice if we merely refer to a chosen few to clarify this defence without the need for comprehensive judicial activism. The Court of Appeal in *Venkatesan Chinnasami v. PP* [2011] 1 LNS 1736 put it aptly in the following terms:

> … A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.

[9] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance *simpliciter* is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. A hypothetical scenario could be when an accused person receives a package which contains illicit drugs from say, England when not a shred of evidence could establish him having been aware of the circumstances of the drugs being sent to him or having any nexus to him. Prior to the parcel appearing at his door step he would not have had any reason for suspicion or the opportunity to inspect the parcel bearing in mind that the package was beyond his reach until it reached his hands. The rider is that everything depends on the facts.

[10] Let us now peruse briefly at the relevant parts of the evidence regarding the current case where every opportunity was made available to the appellant to inspect the bag. It was noticeable that there was no suggestion by the defence that the appellant had enquired from the person who handed the two boxes to him or such a suggestion was made to any of the prosecution's witnesses of the contents. He was in a position to examine the contents of the bag entrusted by that Faruk before it was checked in but failed to do so. He was clearly guilty of wilful blindness (see *Hoh Bon Tong v. PP* [2010] 5 CLJ 240 CA and *PP v. Amil Akmad* [2007] 4 CLJ 688; [2007] 5 MLJ 561 CA). In *Hoh Bon Tong v. PP* (*supra*) when discussing this defence held that:

> The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v. Hla Win* [1995] 2 SLR 424 (at p. 438), "the concept of wilful blindness qualifies the requirement of knowledge". And His Lordship continued further by saying (at the same page):
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> > As Professor Glanville Williams aptly remarked in his Texbook on *Criminal Law*, at p. 125:

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> ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truth is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know'.

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Continuing at the same page, His Lordship said:

> In *Ubaka v. PP* [1995] 1 SLR 267, the principles laid down in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v. PP* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
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> > Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.

D **[11]** In order not to throttle the discretion of judges, let alone no cases are similar, we are loath to lay down restrictive guidelines for courts to consider prior to deciding whether the defence of innocent carrier can prevail. We leave it to the better judgment of the presiding judge. In the case of *Marlan Marpaung v. PP* [2012] 8 CLJ 41 the court had occasion to say:

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> The defence of the appellant cannot stand in isolation. It must be determined by reference to the facts and circumstances prevailing in each particular case (*Ridwan v. PP* [2010] 4 CLJ 570; *Hoh Bon Tong v. PP* [2010] 5 CLJ 240; and *Wong Vui Chin v. PP* [2011] 3 CLJ 383). In our judgment, the appellant could not avail himself of the defence of innocent carrier because there was ample evidence to show that the appellant had
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> knowledge of the drugs that he was carrying. The contemporaneous conduct of the appellant by fleeing the scene and putting up a struggle with the police party before the discovery of the drugs would have a direct bearing on the facts in issue and would have certainly damaged or whittled away the presumption of innocence on the part of the appellant. A reasonable tribunal appraised of the facts and after hearing this appeal
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> would have concluded that the appellant was not an innocent carrier and that the appellant knew that he was carrying the drugs in the black plastic bag (exh. "P24") for the purpose of trafficking.

[12] Appraising his written grounds, the learned judge in the current appeal had clearly addressed his mind to the defence of innocent carrier before

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concluding that such a defence based on the factual matrix failed to raise any reasonable doubt. He had clearly given consideration to the character of Faruk raised by the appellant, the illogicality of the appellant being promised RM2,000 for such an easy task (a factor which conspicuously weighed heavily in his mind), let alone there was insufficient money found on him

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to buy the electrical goods. The appellant's wilful conduct, compounded by his factual impecuniosity, made no sense to his defence hence leading to the inference that he knew the contents of the bag that he carried.

[13] To summarise the total picture, as the first Court of Appeal had earlier concluded that the appellant had *mens rea* possession of the drugs found in the said bag, what with the appellant failing to adduce fresh evidence at the defence stage to rebut that conclusion, the defence of innocent carrier was clearly a non-starter. The credibility of the prosecution's witnesses together with the facts and circumstances of the case established, as opposed to the appellant's unsubstantiated claim that he did not know the contents of the bag, did not create any reasonable doubt in the mind of the learned judge.

[14] The ingredient of trafficking was established when the appellant carried the drugs from New Delhi airport to Kuala Lumpur (see s. 2 of the Act).

Our Decision

[15] Having heard the submissions from the contending parties, we found that the learned trial judge had not misdirected himself on the law. He had adequately considered the evidence both for the prosecution and the defence carefully in the course of his maximum evaluation, and had meticulously supplied his reasons as to why the prosecution's evidence was accepted over the defence, and why the solitary defence of innocent carrier was rejected. We found the conviction and sentence as imposed by the High Court safe as affirmed by the Court of Appeal subsequently. We saw no reason to interfere with the finding of facts of both courts except to rectify the erroneous view held by the Court of Appeal on the proposition of law regarding the defence of innocent carrier. But it must be clarified that despite the unintended error of the Court of Appeal the eventual decision was correct.

[16] We accordingly dismissed the appeal and confirmed the conviction and sentence meted down by the High Court and confirmed by the Court of Appeal.